

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

ARMOND D. WALDEN,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>ULP 11-06-807</u>
	:	
STATE OF DELAWARE, DELAWARE	:	Probable Cause Determination
TRANSIT CORPORATION,	:	and Order of Dismissal
	:	
Respondent.	:	

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). The Delaware Transit Corporation (“DTC”) is an agency of the State.

Prior to his discharge, Armond D. Walden (“Charging Party”) was employed by DTC as a bus driver. During the period of his employment with DTC, Charging Party was a public employee within the meaning of 19 Del.C. §1302(o) and member of a bargaining unit represented by the Amalgamated Transit Union, Local 842 (“ATU”).

Charging Party was discharged from his employment with DTC on or about January 15, 2010. His discharge was grieved and ultimately appealed to arbitration by the ATU, where it was heard before Arbitrator Joseph Loewenberg on or about October 28, 2010. On or about December 7, 2010, Arbitrator Loewenberg issued his decision upholding the discharge. Charging Party received a copy of Arbitrator Loewenberg’s decision on or about December 13, 2010.

On June 13, 2011, Charging Party filed an unfair labor practice charge alleging

that the arbitrator violated the addendum to the collective bargaining agreement (No Fault Attendance Policy) by changing the terms and conditions of employment without negotiating with the respective parties. Charging Party also alleges the arbitrator committed an unfair labor practice by “interrupting the collective bargaining procedure” in violation of §1302(e) of the Act, which provides:

“Collective bargaining” means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

Charging Party asserts DTC failed to honor the No-Fault Attendance policy appended to the negotiated agreement, thereby denying him of the rights guaranteed to public employees by 19 Del.C. §1303, which states, in cited part:

§ 1303. Public employee rights.

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.

Charging Party also alleges DTC failed to take any action to fulfill its statutory obligations since the arbitration decision was issued and has thereby violated 19 Del.C. §1307(a)(6)¹, which states:

¹ Charging Party includes a mistaken reference to 19 Del.C. §1307(b)(3) in ¶7 of the Charge. §1307(b)(3) is identical to §1307(a)(6) except that subsection (b) violations can only be committed by labor

§1307(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

On June 21, 2011, the State filed its Answer to the Charge. The State's Answer maintains that the Charge sets forth legal conclusions to which no response is required. To the extent that a response is required the State denies the allegations. Under New Matter, the State alleges the Charge fails to allege facts which, even if true, would constitute a violation of §1307(a), of the PERA; the Charge is untimely; and that Charging Party lacks standing to bring the Charge in that he has failed to identify any standard under which he could reasonably maintain a claim to an independent right, separate, apart and distinct from claims that can and must be asserted by a certified exclusive employee representative.

On or about July 22, 2011, Charging Party filed a Response to the State's New Matter. The Response essentially denies the New Matter contained in the State's Answer. Appended to this Response, Charging Party included an "Amendment to the Unfair Labor Practice Charge", which states:

The decision rendered by Arbitrator J. Loewenberg on or about December 14, 2011 [*sic*] contained evidences that he went outside the scope of his authority. He inserted circumstances, conditions and/or excuses and connected them to the "No Fault Attendance Policy" which is in the current CBA. The legitimacy of an excuse for "marking off" is simply not a part of the policy. He states and I quote:

"Leaving work because of a difference with management is not a legitimate excuse for "marking off". The only reason Mr. Walden "marked off" on December 19, 2009 was to register his opposition to the cell phone policy. In effect, the protest amounted to an illegal work stoppage."

organizations, employees or their designated representatives, whereas §1307(a) violations are committed by public employers.

He further states in that same decision and I quote:

“Operators know that they are authorized to leave work in the middle of a shift only if the employer has been able to [*sic*] a relief operator.”

He in effect changed the language of the collective bargaining agreement negotiated between ATU and DTC. He also changed the work rules without negotiation. This process belongs to the two parties identified above.

Arbitrator J. Loewenberg decided in the case of Richard Flowers (Grievant) v. DTC (Employer) nearly 5 years earlier. He accepted the “No Fault Attendance” in the CBA without inserting his unauthorized circumstances, conditions and excuses. The award and decision rendered dated June 29, 2009 stated and I quote:

“Employees have a contractual right to “mark off” before or during a shift a limited number of times each year. When an Employee “marks off” he is no longer on active duty or under the Employer’s jurisdiction.”

He is clearly outside of his authority and the Union allowed him to do so with the support of DTC. The “Just Cause” clause has not been met and his own case law exposes him. In my view an Unfair Labor Practice Charge [*sic*] has occurred in this case.

Wherefore, the Charging Party respectfully requests the Unfair Labor Practice Charge be identified and relief be granted.

On or about July 26, 2011, the State filed a Motion to Dismiss Charging Party’s Answer and Charge, asserting Charging Party inappropriately attempted to amend his Charge and failed to properly respond to the State’s New Matter.

This Probable Cause Determination is based upon a review of the pleadings and motions submitted by the parties.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor

practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

In this matter there are no issues of material fact. Arbitrator Loewenberg cannot have committed an unfair labor practice by interrupting the collective bargaining process, as Charging Party claims. Arbitrator Loewenberg is not a named party to the Charge, nor is he a representative or agent of either the ATU or DTC. As provided for in §1307(a) and §1307(b) respectively, the commission of a statutory unfair labor practice is limited to a “public employer or its designated representative” or “a public employee” or “an employee organization or its designated representative.” Arbitrator Loewenberg falls into none of these categories. Consequently, any and all allegations that Arbitrator Loewenberg violated the PERA are dismissed.

There are no new factual or legal allegations raised in the Charging Party's

“Amendment” to the Charge, which was attached to his Response to New Matter. The information contained therein is simply a restatement of Charging Party’s allegations against the Arbitrator, which were addressed and dismissed above. Consequently, the “Amendment” is inconsequential to consideration of the merits of the instant unfair labor practice Charge against DTC.

The essence of Charging Party’s complaint is that his discharge resulted from DTC’s failure to honor the No-Fault Attendance Policy included in the collective bargaining agreement and that DTC failed to challenge what Charging Party perceives to be the arbitrator’s “interruption of the collective bargaining process” in reaching his decision to sustain the discharge. The Public Employment Relations Board is not primarily responsible for application and/or interpretation of negotiated provisions of the collective bargaining agreement; that is the province of the grievance and arbitration procedure negotiated by DTC and ATU Local 842. A grievance was filed by ATU which progressed through the contractual grievance procedure and ultimately to final and binding arbitration. DTC participated at all of the steps of the contractual dispute resolution procedure including arbitration where the arbitrator found DTC had just cause to support its decision to terminate Charging Party. There is no allegation contained in the Charge that there has been any interference with the regular functioning of the grievance and arbitration procedures.

The Charge does not allege any facts sufficient to establish a basis for finding probable cause to believe that a violation of 19 Del.C. §1307(a)(6) or any other provision of the PERA cited in the Charge may have occurred; consequently the Charge is dismissed.

Finally, the union's decision not to appeal the arbitrator's decision was the subject of a separate unfair labor practice charge filed by Charging Party against the ATU. *Walden v. ATU Local 842*, ULP 11-06-808, VII PERB 5101 (2011). The ATU's action has no relevance to the instant unfair labor practice charge against DTC.

DETERMINATION

Consistent with the foregoing discussion, even when considered in a light most favorable to the Charging Party, the pleadings fail to establish probable cause to believe that an unfair labor practice may have occurred.

Wherefore, the Charge is hereby dismissed in its entirety.

Date: August 9, 2011



Charles D. Long, Jr.
Hearing Officer
Del. Public Employment Relations Board